

BEFORE THE FEDERAL ELECTION COMMISSION

2013 JUN 12 PM 3: 26

In the Matter of

Rochelle M. Pingree
Pingree for Congress and Anne Rand
in her official capacity as treasurer
S. Donald Sussman
Magic Carpet Enterprises, LLC

MUR 6394

CELA

SECOND GENERAL COUNSEL'S REPORT

I. ACTIONS RECOMMENDED

(1) Enter into pre-probable cause conciliation with Rochelle M. Pingree ("Pingree"),
Pingree for Congress and Anne Rand in her official capacity as treasurer (the "Committee"), and
S. Donald Sussman ("Sussman"); (2) and
(3) take no further action regarding allegations that Magic Carpet Enterprises, LLC ("Magic
Carpet") made, that Sussman consented to, or that Pingree and the Committee accepted a
prohibited corporate contribution.

II. DISCUSSION

A. Background

In 2010, Rochelle M. Pingree, a candidate for re-election to Maine's First Congressional
District, frequently travelled on a private jet that S. Donald Sussman, her then-fiancé (who
became her husband in 2011), leased from Magic Carpet, a limited liability company he created
and owned to operate the aircraft. The issues in this matter are whether: (1) Pingree and the
Committee violated The Honest Leadership and Open Government Act of 2007 ("HLOGA")
prohibition on House candidates using noncommercial aircraft for campaign-related travel on
one or more occasions, including a September 13, 2010, trip to a fundraiser in New York City,
and (2) Magic Carpet and Sussman made, and Pingree and the Committee accepted, either

1 prohibited or excessive in-kind contributions in the form of travel to one or more 2010 campaign
2 events. Respondents have argued that Pingree routinely flew on the private jet because of her
3 personal relationship with Sussman and would have made the same private trips, including trips
4 on which she attended campaign events, irrespective of her status as a candidate for re-election.

5 Based on information regarding Pingree's trips to and from the September 13, 2010,
6 fundraiser in New York City, the Federal Election Commission ("Commission") found reason to
7 believe that Pingree violated 2 U.S.C. § 439a(c)(2) and 11 C.F.R. §§ 100.93(c)(2) and 113.5(b)
8 by traveling on a non-commercial aircraft in connection with an election for federal office, and
9 that the Committee violated 2 U.S.C. § 439a(c)(2) and 11 C.F.R. § 113.5(b) by accepting
10 Pingree's travel on a non-commercial aircraft. *See* MUR 6394 Certification (Jun. 30, 2011). At
11 the time, it was unclear whether Magic Carpet was a corporation or a partnership. Therefore, the
12 Commission found reason to believe (1) that Magic Carpet violated 2 U.S.C. § 441b(a) by
13 making a corporate in-kind contribution in the form of non-commercial air travel, and that
14 S. Donald Sussman, principal of Magic Carpet, violated 2 U.S.C. § 441b(a) and 11 C.F.R.
15 § 114.2(e) by consenting to a prohibited in-kind contribution, or alternatively, (2) that Sussman,
16 who had contributed the maximum amount to the Committee for the 2010 primary and general
17 elections, violated 2 U.S.C. § 441a(a)(1)(A) by making an excessive in-kind contribution in the
18 form of Pingree's travel expenses.¹ *Id.* The Commission further found reason to believe that
19 the Committee violated either 2 U.S.C. §§ 441a(f) or 441b(a) by accepting an excessive or
20 corporate in-kind contribution from Pingree's travel on a non-commercial aircraft. *Id.*

¹ After the Commission found reason to believe, Respondents initially asserted that the finding as to Sussman in his individual capacity should be withdrawn because Sussman was notified of the Complaint only in his capacity as principal of Magic Carpet. *See* Supp. RTB Resp. at 1, n.1 (Dec. 3, 2012). Respondents do not dispute that Sussman had notice of the Complaint, that he was involved in formulating Magic Carpet's response to the

1 The Commission authorized an investigation with compulsory process to determine
2 (1) the value of Pingree's flights on the Magic Carpet jet, (2) whether other flights that Pingree
3 took aboard the aircraft were for campaign-related travel, and (3) whether the resulting in-kind
4 contribution was corporate or excessive. *Id.*; see First Gen. Counsel's Rpt. at 11 ("First GCR").

5 During the investigation, Respondents vigorously reiterated their position that Pingree's
6 noncommercial travel was not an unlawful expenditure, based on the same arguments they had
7 presented in response to the initial complaint — that is, the trips would have been taken aboard
8 the private aircraft irrespective of the candidate's campaign. After extensive discussions,
9 Respondents voluntarily provided much of the information needed to complete the investigation.
10 Respondents also propose to conciliate this matter if the Commission is willing to be flexible in
11 its settlement proposal, particularly with regard to the wording of the admission clause. *See*
12 Supp. RTB Resp. (Dec. 3, 2012). As set forth below, in light of the circumstances presented in
13 this case, including what we assess may be certain litigation risks, we recommend that the
14 Commission seek to conciliate the matter on the terms described below.

15 **B. Results of Investigation**

16 Sussman wholly owns Magic Carpet, a Delaware limited liability company that elects to
17 be treated as a partnership by the Internal Revenue Service. RTB Resp. at 1, n.1 (Aug. 12, 2011).
18 Magic Carpet, in turn, owns a 19-seat 2007 Dassault Falcon 2000 EX Easy private jet that it
19 leases to Sussman pursuant to a November 2007 written lease agreement. Supp. RTB Resp. at 1,

Complaint, that he had a full opportunity to make a substantive response to the Complaint, or that he had a full opportunity to make a response different from that previously made on behalf of Magic Carpet after receiving notification of the Commission's findings. *Id.* Furthermore, during the investigation Sussman acknowledged that he is the sole partner of Magic Carpet and that he paid for Pingree's noncommercial travel to campaign events. Accordingly, we are unaware of any basis for asserting that Sussman was prejudiced by the initial notification being sent to him in his capacity as the sole principal of Magic Carpet.

1 Attach. 1 (Nov. 4, 2011). Under the lease, Sussman has exclusive operational control of the jet
2 and is responsible for all operational costs, including payments for the crew, maintenance, and
3 repairs. *Id.*

4 Sussman maintains an office and home in Greenwich, Connecticut (roughly one hour
5 north of New York City), and residences in Maine and the Upper West Side of Manhattan, New
6 York City. Supp. RTB Resp. at 2 (Dec. 16, 2011); Supp. RTB Resp. at 1, Attach. 1 (Nov. 14,
7 2011) ("Pingree Decl."). Due to their busy schedules, Pingree and Sussman scheduled pockets
8 of time to spend together, and Pingree frequently accompanied Sussman on the jet prior to their
9 marriage on June 18, 2011. Supp. RTB Resp. at 2-3 (Dec. 16, 2011); RTB Resp. at 1-2 (Aug. 12,
10 2011). Both Pingree and Sussman have interests in New York: Sussman frequently travelled to
11 New York City on business, and Pingree accompanied him to the New York area on over thirty
12 occasions between 2008-2010. Supp. RTB Resp. at 1, Attach. 4 (Nov. 14, 2011). While visiting
13 New York City, Pingree typically would visit her son, Asa Pingree, and her grandson, who live
14 in Brooklyn, New York. RTB Resp. at 1 (Aug. 12, 2011).

15 1. September 13, 2010, Trip to New York City

16 In the summer of 2010, Pingree and the Committee began planning a re-election
17 fundraiser in New York City. Supp. RTB Resp. at 2 (Dec. 16, 2011). Pingree conferred with
18 Sussman to identify a date that would enable them to spend the day together while she was there
19 for her campaign event. *Id.* Sometime around August 13, 2010, the Committee's Finance
20 Director confirmed that the fundraiser was scheduled for Monday, September 13, 2010, at a
21 private residence on Manhattan's East Side in New York City from 6:30 p.m. to 8:00 p.m. Supp.
22 RTB Resp. at 1, Attach. 3 (Nov. 14, 2011).

1 On September 13, 2010, the day of the fundraiser, Pingree traveled with Sussman from
2 Portland, Maine to Westchester County Airport in White Plains, New York ("White Plains
3 Airport") on the jet. Supp. RTB Resp. at 2 (Dec. 16, 2011); Pingree Decl. After arriving at
4 White Plains Airport at 1:20 p.m., Pingree and Sussman drove to Greenwich, Connecticut where
5 Sussman worked at his office and Pingree spent time at Sussman's residence. Supp. RTB Resp.
6 at 2 (Dec. 16, 2011). They later drove to Sussman's apartment in Manhattan, New York City,
7 where they met with Sussman's client, Jeffrey Kittay. *Id.*; Pingree Decl. After about 15 to 30
8 minutes, Pingree left the meeting with Kittay to go across town to the Upper East Side private
9 residence where the fundraiser would be held. Supp. RTB Resp. at 3 (Dec. 16, 2011); Pingree
10 Decl. Pingree met her son and grandson at the private residence. *Id.* Later that evening, Pingree
11 and Sussman attended the 6:30 p.m. fundraiser. Pingree Decl. No Committee staff attended the
12 fundraiser. Supp. RTB Resp. at 3 (Nov. 23, 2011). After the fundraiser ended, Pingree and
13 Sussman drove back to White Plains Airport, and at 9:22 p.m. flew on the jet to Washington,
14 D.C. Supp. RTB Resp. at 3 (Dec. 16, 2011); Pingree Decl.

15 2. Pingree's Additional Campaign Travel on the Jet

16 Respondents acknowledge that Pingree took at least one additional campaign-
17 related trip on the jet that spanned from September 30, 2010, to October 4, 2010. Supp.
18 RTB Resp. at 6 (Dec. 3, 2012). According to Respondents, Pingree flew from Washington

1 D.C. just before 7:00 p.m. on September 30, 2010, and arrived in Portland, Maine, just after
2 8 p.m. *Id.* at 6-7. The next day, October 1, 2010, Pingree attended a campaign fundraiser
3 that was scheduled from 5:30 p.m. to 7:00 p.m. *Id.* Afterwards, Pingree attended a
4 Democratic candidates' event in Kennebunk/Kennebunkport that was scheduled from 7:00
5 p.m. to 8:00 p.m. *Id.* at 7. The following day, October 2, 2010, Pingree attended a
6 Seacoast Democrats event that was scheduled from 3:00 to 4:00 p.m. and a campaign house
7 party that was scheduled from 4:30 p.m. to 6:30 p.m. *Id.* On October 4, 2010, Pingree flew
8 on the jet from Portland, Maine to Westchester, New York for a nonprofit fundraiser — the
9 only scheduled event on Pingree's calendar for the day. *Id.* Respondents did not state
10 whether Pingree flew back to Washington, D.C. on the jet after the Westchester, New York
11 fundraiser. *Id.*

12 3. Costs Associated with Travel on the Jet

13 The jet is a luxury 19-passenger turbojet business aircraft that logs approximately 500
14 hours per year. *See* Supp. RTB Resp. at 1, Attach. 2 (Nov. 14, 2011) ("Wilson Aff."). The
15 hourly cost of a flight on the jet is approximately \$4,984.³ Supp. RTB Resp. at 3 (Dec. 16,
16 2011); Supp. RTB Resp. at 3-4 (Nov. 23, 2011). The
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³ An internet search for costs of charter travel on a Falcon 2000 EX jet, which can seat between 8 and 19 passengers, shows hourly rates ranging from \$4,500 to \$5,000 in the United States. *See* <http://www.airchartersguide.com/aircraftsearch.aspx> (last visited Mar. 20, 2013). One charter company's website shows hourly rates for the jet ranging from \$4,500 to \$8,000 depending on the amenities or configuration of the jet. *See* http://www.tungstenproperty.com/jet_charter_falcon_2000_ex (last visited Mar. 20, 2013).

1 *Id.*; Supp. RTB Resp. at 1, Attach. 1 (Nov. 4, 2011). Sussman pays for all
2 of the costs associated with the jet. Wilson Aff. ¶ 7; RTB Resp. at 1, n.1 (Aug. 12, 2011).

3 In valuing the cost of flights on the jet, Respondents state that it is common industry
4 standard to value flights to the tenth of an hour, rather than to the whole hour. Based on that
5 approach, Respondents assert that September 13, 2010, flight lasted a total of 1.6 hours (.8 hour
6 each flight), for a total cost of \$7,974.40 (\$4,984 x 1.6 = \$7,974.40).⁵ See Wilson Aff. at 8;
7 Supp. RTB Resp. at 6, App. B ¶ 9 (Dec. 3, 2012). Respondents did not provide similar cost
8 totals for Pingree's September 30 to October 4, 2010 trip, but we conclude the costs would be
9 about the same, as that trip involved the same destinations (in a different order) as the
10 September 13, 2010, trip.

11 **C. Analysis**

12 HLOGA amended the Federal Election Campaign Act of 1971, as amended (the "Act"),
13 to prohibit House candidates from making expenditures for non-commercial aircraft travel.
14 2 U.S.C. § 439a(c)(2). The Commission promulgated implementing regulations that became
15 effective January 6, 2010. See Explanation and Justification, 74 Fed. Reg. 63,951 (Dec. 7,
16 2009). Commission regulations provide that House candidates are prohibited from non-

⁵ That \$7,974.40 does not include standard repositioning costs to return the jet from Washington, D.C. to its base at the White Plains Airport. See Second Gen. Counsel's Rpt. at 5 (Nov. 30, 2012), MUR 6421 (Benishek for Congress) (including costs for repositioning noncommercial aircraft in calculation of in-kind contribution). We do not include those repositioning costs in this instance because Sussman, the owner of the jet, used it for his own purposes after leaving Pingree in Washington, D.C.

1 commercial air travel while campaigning, 11 C.F.R. § 100.93(c)(2), and from accepting in-kind
2 contributions in the form of non-commercial air travel. *Id.* § 113.5(b). The prohibition applies
3 to a House candidate who is a “campaign traveler,” which includes, “any candidate traveling in
4 connection with an election for Federal office.” *Id.* § 100.93(a)(3)(i)(A).

5 HLOGA permits a House candidate to travel on an aircraft owned or leased by the
6 candidate or the candidate’s “immediate family member.” 2 U.S.C. § 439a(c)(3). HLOGA
7 limits immediate family members to a father, mother, son, daughter, brother, sister, husband,
8 wife, father-in-law, or mother-in-law, and does not include “fiancé” among immediate family
9 members. 2 U.S.C. § 439a(c)(3)(B); 11 C.F.R. §§ 100.93(g)(4), 113.5(c)(3).

10 The Act prohibits any candidate or political committee from accepting any contribution
11 that exceeds the contribution limits. 2 U.S.C. § 441a(f). During the 2010 election cycle, the Act
12 prohibited any person from making contributions to any candidate or the candidate’s authorized
13 committee with respect to a federal election that in the aggregate exceeded \$2,400. 2 U.S.C.
14 § 441a(a)(1)(A). A contribution by a limited liability company that is owned by a sole individual
15 and does not elect to be treated as a corporation by the Internal Revenue Service is attributed
16 only to the individual. *See* 11 C.F.R. § 110.1(g)(4).

17 Pingree was a campaign traveler as defined by 11 C.F.R. § 100.93(a)(3)(i)(A): she flew
18 on a non-commercial aircraft from Portland, Maine, to her 2010 re-election campaign fundraiser
19 in New York City on September 13, 2010, and then returned to Washington, D.C., on the same
20 non-commercial aircraft. Pingree also flew on the same aircraft from Washington, D.C., to
21 Maine on September 30, 2010, where she attended a campaign fundraiser and a Democratic
22 candidates’ event in Maine the next day, October 1, 2010. Pingree then further attended a
23 Seacoast Democrats event and a campaign house party the following day, October 2, 2010. On

1 October 4, 2010, two days after these campaign stops, Pingree flew on the jet from Portland,
2 Maine, to Westchester, New York, for a nonprofit fundraiser.

3 Thus, Pingree was a campaign traveler and violated the Act when she travelled on her
4 fiancé's non-commercial aircraft in the course of her campaign activities. *See* 2 U.S.C.
5 § 439a(c)(2); 11 C.F.R. §§ 100.93(c)(2), 113.5(b). The Committee also violated the Act by
6 accepting the costs of Pingree's non-commercial travel. *See* 2 U.S.C. § 439a(c)(2); 11 C.F.R.
7 § 113.5(b). Pingree and the Committee further violated the Act by accepting an excessive in-
8 kind contribution because Sussman had already contributed the maximum \$2,400 individual
9 contributions to the Committee for the 2010 primary and general elections. *See* 2 U.S.C.
10 § 441a(f). Sussman, the sole owner of Magic Carpet, also violated the Act by making an
11 excessive in-kind contribution when he paid for Pingree's non-commercial travel. *See* 2 U.S.C.
12 § 441a(a)(1)(A).

13 Nonetheless, because Magic Carpet, a limited liability company, is not treated as a
14 corporation for tax purposes, it could not have violated 2 U.S.C. § 441b(a) by making a corporate
15 in-kind contribution in the form of noncommercial air travel. Therefore, we recommend that the
16 Commission take no further action regarding its reason to believe findings that Magic Carpet
17 violated 2 U.S.C. § 441b(a), that Sussman violated 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(e),
18 and that the Committee violated 2 U.S.C. § 441b(a).

19 Respondents do not dispute that Pingree travelled on a non-commercial aircraft and
20 attended several 2010 re-election campaign fundraisers and other campaign events during her
21 trips. Supp. RTB Resp. at 2 (Dec. 3, 2012). Rather, Respondents dispute that the flights
22 constitute a prohibited expenditure under HLOGA, and contend that Pingree was not a
23 "campaign traveler" under the Commission's regulations. Supp. RTB Resp. at 2, 7-8 (Dec. 3,

1 2012). Respondents maintain that Pingree would have travelled on the jet to the relevant
2 destinations — Washington, D.C., Maine, and New York — for personal reasons irrespective of
3 her candidacy or the campaign events. Therefore, Respondents argue that Pingree's use of the
4 jet does not constitute an in-kind contribution or expenditure, citing Advisory Op. 2002-05
5 (Hutchinson).⁶ Supp. RTB Resp. at 8 (Dec. 3, 2012); RTB Resp. at 7-10 (Aug. 12, 2011).

6 The Commission rejected this precise argument at the reason to believe stage,
7 recognizing that Advisory Op. 2002-05, which pre-dates HLOGA and the Commission's
8 implementing regulations, is inapplicable here. Factual & Legal Analysis (Pingree) at 7
9 ("F&LA"); F&LA (Magic Carpet) at 7. HLOGA prohibits the use of non-commercial flights by
10 House candidates engaged in campaign travel. *Id.* Both HLOGA and the Commission
11 regulations create a bright-line test for any travel in connection with the candidate's election.
12 F&LA (Pingree) at 7-8; F&LA (Magic Carpet) at 7. The HLOGA restrictions on a "campaign
13 traveler" are not altered or negated by a House candidate including some amount of non-
14 campaign activity on a trip involving scheduled campaign activity.⁷ F&LA (Pingree) at 8;
15 F&LA (Magic Carpet) at 7. The Commission has already determined that, because
16 Representative Pingree went to a campaign fundraiser while on the trip to New York City, she is
17 a covered campaign traveler who may not travel on a non-commercial aircraft. *Id.* And that

⁶ In AO 2002-05, the Commission analyzed the apparent conflict between its since-modified travel regulations at 11 C.F.R. § 106.3(b)(3) and its personal use regulations at 11 C.F.R. § 113.1(g) when a mayor, who was also a federal candidate, traveled to Washington, D.C. for city business, personal activities, and federal campaign activity. The Commission concluded that the candidate's campaign-related travel was not incidental but that the candidate's committee was only required to pay for the additional costs related to the campaign activity. *Id.* Further, because the candidate's travel would have occurred irrespective of the campaign activity, the candidate's campaign was not required to reimburse the city for the commercial airfare. *Id.*

⁷ Respondents' arguments about the "primary purpose" of the trip might be relevant to determining whether Sussman could pay for Pingree's commercial airfare on a trip with him that would have occurred irrespective of her candidacy, but are irrelevant to determining whether Pingree could use prohibited non-commercial flights in connection with her re-election campaign. F&LA (Pingree) at 8; F&LA (Magic Carpet) at 7.

1 same reasoning applies to the trip spanning September 30 to October 4, 2010. Respondents have
2 not presented additional information or argument that should cause the Commission to
3 reconsider its initial conclusion.

4 Subsequent to the Commission's RTB findings, Respondents also raised one new
5 argument, contending that the costs of Pingree's trips are not reportable as an expenditure under
6 11 C.F.R. § 106.3(d) because the trips involved roundtrip flights from Washington, D.C., to
7 Pingree's home state of Maine, with a stopover in New York. RTB Resp. at 10-12 (Aug. 12,
8 2011); Supp. RTB Resp. at 7-8 (Dec. 3, 2012). Respondents cite MUR 1729 (Young), which
9 pre-dates both HLOGA and the Commission's corresponding regulations. Respondents'
10 argument is meritless because both HLOGA and the Commission's implementing regulations
11 expressly override any prior inconsistent provision of the Act or Commission's regulations.
12 *See* 2 U.S.C. § 439a(c)(2); 11 C.F.R. § 113.5(b) (HLOGA noncommercial House travel
13 prohibition applies "notwithstanding any other provision"). Additionally, MUR 1729 is
14 inapposite because it involved official governmental travel on a U.S. Coast Guard aircraft and
15 stopovers within the candidate's home state. *See* MUR 1729 (Young) Certification (Jan. 15,
16 1985) (Alaska congressional candidate did not have to report the cost of travel from Washington,
17 D.C. to Juneau where he attended a campaign event during a congressional fact-finding trip).

18 As explained below, Respondents are unwilling to concede their positions but are willing
19 to engage in conciliation negotiations to seek to compromise the disputed claims. We believe
20 that the investigation has provided adequate information to enable the Commission to conciliate
21 this matter, and we recommend that the Commission enter into pre-probable cause conciliation
22 with Respondents as described below.

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V. RECOMMENDATIONS

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1. Enter into pre-probable cause conciliation with Rochelle M. Pingree;
2. Enter into pre-probable cause conciliation with Pingree for Congress and Anne Rand in her official capacity as treasurer;
3. Enter into pre-probable cause conciliation with S. Donald Sussman;

¹⁰ In a prior similar matter, we proposed the HLOGA reimbursement rate for non-House candidates. *See* Second GCR at 8 (Nov. 30, 2012), MUR 6421 (Benishek for Congress) (applying reimbursement of "fair market value . . . based on the charter rate for a 'comparable plane of comparable size' to the one actually flown" per 2 U.S.C. § 439a(c)(1)(B)). We did not have actual cost figures for the flights in MUR 6421 as we do in this case.

- 4.
5. Take no further action regarding the Commission's reason to believe finding that Magic Carpet Enterprises, LLC violated 2 U.S.C. § 441b(a) and that S. Donald Sussman violated 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(e);
6. Take no further action regarding the Commission's reason to believe finding that Pingree for Congress and Anne Rand in her official capacity as treasurer violated 2 U.S.C. § 441b(a); and
7. Approve the appropriate letters.

Date

6/12/13

Anthony Herman
General Counsel

Daniel A. Petalas
Associate General Counsel

Mark Shonkwiler
Assistant General Counsel

Kamau Philbert
Attorney